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Supreme Court of the United States

OCTOBER TERM, 1940

No. 953

KEARNS COAL CORPORATION,
Petitioner,

against

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

RESPONDENT'S REPLY BRIEF

WILLIAM DIKE REED,
WILLIAM J. MCARTHUR,
Counsel for Respondent.

New York, May 21st, 1941.

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A

As pointed out in the opinion written by Circuit Judge CLARK for the United States Circuit Court of Appeals, for the Second Circuit, "this action has been brought to determine the ultimate responsibility, as between two insurance companies, for damages paid for personal injuries inflicted December 31, 1933." The insurance companies here referred to are the Travelers Insurance Company, which had issued a policy of automobile liability insurance to the petitioner, Kearns Coal Corporation, and the United States Fidelity and Guaranty Company, which had issued an automobile liability insurance policy to the Newton Contracting

Company, the owner of a motor truck which was rented to and used on the day of the accident in delivering coal in New York City for plaintiff Kearns Coal Corporation.

It is also noted in the opinion of the Circuit Court of Appeals that "plaintiff sues herein for Travelers' benefit to recover the sum paid to settle its liability * * *." After referring to the trial in the underlying action which resulted in a judgment on May 12, 1937, for the Pasleys against plaintiff herein for $36,855.02, which was compromised and satisfied on July 9, 1937, by the payment of $15,000, the opinion of the Circuit Court of Appeals reads:

> "Travelers advanced this sum to plaintiff upon the latter's agreement to prosecute this action in Travelers behalf."
>
> *Kearns Coal Corporation* v. *United States Fidelity & Guaranty Co.*, 118 Fed. (2d) 33, at 34.

It, therefore, appears that the Travelers Insurance Company is the real party in interest here. The petitioner is merely a nominal plaintiff which is suing for the benefit of its insurance company, which had written this policy of automobile liability insurance for the Kearns Coal Corporation, covering all of its hired automobiles (Ex. I, p. 413).

The cases of *Rosenblum* v. *Maryland Cas. Co.*, 153 App. Div. 23; *Rosenwasser* v. *Globe Indemnity Co.*, 224 N. Y. 561; *Gerka* v. *Fidelity & Casualty Co.*, 251 N. Y. 51, 57; *Utterbach Gleason Co.* v. *Standard Acc. Ins. Co.*, 193 A. D. 646; affirmed 233 N. Y. 549, cited by petitioner, are clearly distinguishable from the case at bar. In each of these cases, the defendant insurance company carried the actions of the assured through to a judgment or settlement. It is clear from reading these cases that the assureds in each

case were completely excluded from the control of the litigation either until a verdict was reached or a settlement achieved.

The estoppel in those cases arose not from the mere retention of the action for a short time by the insurance company but by the prejudice which resulted from the inability of the assureds to control the litigation. The insurers were unable to withdraw from the defense after such verdict or settlement because the settlement or verdict having been achieved, the assureds were no longer in a position to help themselves.

Thus in *Gerka* v. *Fidelity & Casualty Co., supra,* the Court, by HUBBS, *J.,* stated at page 57:

> "The defendant did not at any time offer to turn over the papers in the action to the insured. It continued with the defense of the action, paid the witness fees, conducted the trial, appealed to the Appellate Division and offered to pay the plaintiff a sum of money to settle the action."

And also in *Utterbach Gleason Co.* v. *Standard Acc. Ins. Co., supra,* the Court, by KILEY, *J.,* stated at page 653:

> 'Appellant kept in and defended the case; prepared and argued it upon appeal and took all chances, according to its theory upon respondent's money, until it was finally determined that someone must pay Caroline T. Willey for her injury. Then appellant refused to pay. It could not keep control of the action and thus gamble with the release, and its idea of suppression of evidence in a former action brought against a third party and covered by another's insurance contract."

But in the case at bar, the petitioner cannot complain of any loss of control of the litigation. This petitioner itself refused to accept control of its own litigation when

the defendant expressly offered that control to the petitioner (Plaintiff's Exhibits 23, 24, 26, pp. 375-382). The case of *Sachs* v. *Maryland Cas. Co.*, 170 App. Div. 494, cited by petitioner, is also clearly distinguished for this reason. This case stresses the fact that the assured was excluded from any control in the litigation.

The respondent here did not carry the defense of the Kearns Coal Corporation in the *Pasley* action to a judgment or settlement. That corporation was not denied the right to settle the case or assume charge of the litigation. The papers in the *Pasley* action were returned by the Fidelity Company to the Kearns Coal Corporation "for your personal attention or that of your insurance carrier" on October 24th, 1934 (Ex. 9, pp. 346-347).

The Travelers Insurance Company thereupon assumed the defense of the *Pasley* action on behalf of the Kearns Coal Company. The attorney, a Mr. Garvey, assigned to the case by the Travelers, came to the office of respondent, reviewed its entire file and took therefrom certain statements, photographs and other investigation material to assist him in the case (ff. 821-822). It was this attorney, George A. Garvey, designated by the Travelers Insurance Company, who acted as trial counsel for the Kearns Coal Corporation on the first trial of the *Pasley* action in March, 1935, and after the verdict on that trial was set aside again conducted the defense *de novo* on the second trial of the same case in May, 1937.

The final judgment on May 12th, 1937 in favor of the Pasleys against the Kearns Coal Corporation was therefore about two and one-half years after the respondent had disclaimed liability and returned the papers in the *Pasley* case to the plaintiff in the present action. During all of this time, the attorneys designated by the Travelers

Insurance Company, to act for Kearns Coal Corporation, were in exclusive control of its defense in that action. It is obvious that the petitioner here did have control of its own litigation in the accident case. No suggestion has ever been made by petitioner that this period of two and one-half years was insufficient time for its attorney to adequately prepare its defense. In the absence of any real complaint of loss of control of the underlying litigation, the normal and usual rule applied by the courts in New York State is that actual prejudice to an insured must first be shown before an estoppel can be claimed. (See cases cited on page 15 of respondent's brief.) The distinction here drawn was made by the New York Court of Appeals in the cause of *Knauss Inc.* v. *Indemnity Ins. Co.*, 270 N. Y. 211 at page 216, where the Court said, by CROUCH, *J.*:

> "There were no circumstances of estoppel or election by which the insured was denied the right to settle the case or assume charge of the litigation, as in *Brassil* v. *Maryland Cas. Co.* (210 N. Y. 235) and other like cases. There is no evidence or reason to infer that plaintiff was misled or prejudiced in any way."

And so in the case at bar, the petitioner must show more than mere delay on the part of respondent in making its disclaimer. It must show that it suffered actual prejudice by reason of defendant's conduct other than the fact of such delay. This it failed to do. It has been repeatedly held that mere delay in making a disclaimer will not estop an insurance company where such disclaimer leaves the assured with an adequate opportunity to defend the action, and the assured suffered no other prejudice in the interim.

Thus in *American Cereal Co.* v. *London Guarantee & A. Co.*, 7 Cir., 211 Fed. 96, the Court said at page 99:

> "But there is no estoppel unless plaintiff has been misled or injured * * *. If, in truth, 'after the trial' the submission of the *Overhouser* case was set aside and plaintiff came into charge of the defense *de novo,* and if defendant had been misled into undertaking the defense by plaintiff's representation that the building was being erected by an independent contractor in accordance with the terms of the Indemnity contract, when plaintiff was actually constructing the building itself, not only was there no injury suffered to plaintiff, but defendant was amply justified in withdrawing."

The Court in *Kitsap County Transportation Co.* v. *Pacific Coast Cas. Co.,* 67 Wash. 297, 301, also in a similar case, ruled as follows:

> "There was nothing to show that there was not ample time in which to obtain all the facts upon which a defense might be based, or that appellant could have done anything it did not do in support of its defense in the *Juul* case. * * * It was not competent for it to tell the jury it was injured and prejudiced in its defense."

The case of *Miller* v. *Union Indemnity Co.,* 209 App. Div., 455, 457, affirmed without opinion 240 N. Y. 627 and the case of *269 Canal Street Corporation* v. *Zurich Co.,* 226 App. Div. 516-518 affirmed without opinion 252 N. Y. 603 are distinguishable since both clearly involved questions of waiver and not estoppel. The distinction between waiver and estoppel is well fixed since waiver is a matter of intention which needs no prejudice to support it, whereas an estoppel must have prejudice to support it.

> *Draper* v. *Oswego County Fire Association,* 190 N. Y. 12, 16.

But in the case at bar, no claim has ever been made of waiver. In fact, petitioner argued in the Court below:

"This is not a case of waiver as in the *S. & E. Motor Company* case, which involves the question of intent. This is a case of estoppel by conduct" (Petitioner's Brief in Circuit Court of Appeals, p. 42).

B

There is ample evidence in this record to show that the Travelers Insurance Company at first refused to assume its rightful obligation to the Kearns Coal Corporation and defend it. On two occasions these refusals to appear were made even upon the express statement of the defendant, United States Fidelity and Guaranty Company, that the Kearns Coal Corporation was not insured under Newton's policy (Plaintiff's Exhibits 23, 24, 26; pp. 375-382).

The assurance given by Mr. Campbell in his conversation with Mr. O'Donnell, or Mr. Dwyer of the United States Fidelity and Guaranty Company that the Traveler's policy was an "excess policy only" was a misstatement of the facts. At the time of that conversation, no questions of estoppel by conduct was present. The United States Fidelity and Guaranty Company had done nothing as yet which could rise to any conceivable claim of estoppel. Neither could Mr. Campbell anticipate that any such claim would be made in the future. Also there existed at that time several complete defenses to any action brought by the Kearns Coal Corporation on the Fidelity Company's policy.

If the Kearns Coal Corporation had control of the truck at the time of the accident, this plus the fact that they paid $30 per day for the use thereof would have constituted a "renting" in violation of section IV(b) of the defendant's policy.

On the other hand if the Kearns Coal Corporation did not have control of the truck at the time of the accident, then it could not have been "operating" the truck so as to fall within the "omnibus Clause," section II(1) of the defendant's policy. Since no liability existed under the policy of the United States Fidelity and Guaranty Company, the only policy of insurance held by the Kearns Coal Corporation was that of the Travelers Insurance Company with its "Hired Automobiles Endorsement." Therefore, that policy could not have been and was not an "excess" policy. In the face of the false and misleading statement to this effect by Mr. Campbell, the Kearns Coal Corporation should be precluded now from raising any claim of estoppel against the defendant.

As was stated in the case of *Morrison* v. *Royal Indemnity Co.*, 180 App. Div. 709, at page 713:

> "The plaintiff cannot predicate an estoppel on the falsity of his own representation."

The correspondence between the parties indicates clearly that the United States Fidelity and Guaranty Company was cognizant of the danger of the impending default by the Kearns Coal Corporation. The correspondence indicated that unless some appearance was put in for the Kearns Coal Corporation, a default would result (see ff. 1125, 1131-1134, 1140). The letter of the Travelers Insurance Company, dated February 6, 1934, was an affirmative statement as to this fact which was most apparent since the summons in the *Pasley* action had been served on January 5th, 1934, and immediately sent by Kearns Coal Corporation to its insurer, the Travelers Insurance Company.

Whether or not a default would be taken against the Kearns Coal Corporation for failure to answer and appear in the *Pasley* action was of the utmost importance and not

"irrelevant," as petitioner suggests. Even aside from the obvious damage which such a default would have caused to the Kearns Coal Corporation, a default would also have seriously prejudiced the Newton Contracting Company. The Newton Contracting Company was the owner of the truck and its liability was a statutory and derivative one. It is apparent that a default against the Kearns Coal Corporation, with the admission of liability implicit therein, would necessarily have hampered and embarrassed the proper defense of the owner as well as the renter of the truck. The respondent helped, rather than harmed, the petitioner at this critical stage.

C

The cases of *Sauriolle* v. *O'Gorman,* 86 N. H. 39; *Horn* v. *Commonwealth Gas. Co.,* 105 N. J. L. 616; *Peterson* v. *Maloney,* 181 Minn. 437, cited by petitioner, do not sustain the proposition that a party which has no rights at all under a policy of insurance not issued to it, may become an "assured" thereof by alleging and proving an estoppel. In each of these cases, the party suing was the "*injured party.*" Under former section 109 of the Insurance Law of the State of New York, a statutory right was given to an "injured party" and to none other to bring an action against the insurance carrier of the judgment debtor. But in the case at bar, the Kearns Coal Corporation, not being an "injured party," had no statutory right on which to proceed. And, as demonstrated in Point II of respondent's brief, it likewise had no rights under the policy of insurance issued to the Newton Contracting Company, since the Kearns Coal Corporation did not fall within the definition of an "additional assured" as defined in Section II(1) of the policy. Being a stranger thereto, it had no right to claim any estoppel whatsoever against respondent.

CONCLUSION

The petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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